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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL ADVOCATES,
an Oregon non-profit corporation,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, an agency of the United
States of America,

Defendant.

Case No. 19-887

COMPLAINT

INTRODUCTION

1. This action alleges the U.S. Environmental Protection Agency (“EPA”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in responding to a FOIA request and administrative FOIA appeal submitted by plaintiff Northwest Environmental Advocates (“NWEA”). Specifically, NWEA challenges EPA’s inadequate search for, and unlawful

1 withholding of, records and portions of records responsive to a FOIA request NWEA submitted
 2 to EPA on September 13, 2017, as well as EPA's failure to respond to NWEA's October 24,
 3 2018 administrative FOIA appeal within the twenty-day timeline set by the FOIA. NWEA seeks
 4 declaratory relief, an injunction requiring EPA to comply with the FOIA, and an award of
 5 reasonable attorneys' fees and other litigation costs.

6 **JURISDICTION, VENUE AND BASIS FOR RELIEF**

7 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B)
 8 and 28 U.S.C. § 1331 because this action arises under the FOIA and the Declaratory Judgment
 9 Act, 28 U.S.C. §§ 2201-2202.

10 3. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) because a
 11 portion of the responsive records may be found in this district.

12 4. Declaratory relief is appropriate under 28 U.S.C. § 2201.

13 5. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. §
 14 552(a)(4)(B).

15 **PARTIES**

16 6. Plaintiff Northwest Environmental Advocates is a regional non-profit
 17 environmental organization founded in 1969 and incorporated under the laws of Oregon in 1981,
 18 with its principal place of business in Portland, Oregon. NWEA's mission is to work through
 19 advocacy and education to protect and restore water and air quality, wetlands, and wildlife
 20 habitat in the Northwest and across the nation. NWEA employs public education, community
 21 organizing, strategic partnerships, public records requests, information sharing, advocacy with
 22 administrative agencies, policy analysis, lobbying, expert analysis, and litigation to ensure better
 23 implementation and enforcement of the nation's laws that preserve the natural environment and
 24 protect water quality.

25 7. NWEA is a leader in protecting water quality and endangered aquatic species,
 26 and actively participates in many state and federal agency actions that affect water quality.
 27 NWEA provides advice and information to many environmental organizations across the
 28

country. Indeed, NWEA is an informational conduit to the public, the media, government agencies, and other environmental organizations such as water quality groups, salmon conservation and recovery groups, and organizations focused on protection of endangered species as well as regulatory agencies that implement the Clean Water Act and the Endangered Species Act.

8. NWEA is engaged in ongoing public outreach, education, and government “watch dog” efforts regarding state and federal compliance with environmental statutes. The records in this action are requested in support of NWEA’s ongoing efforts to improve water quality and the protection of aquatic species through proper implementation of the Clean Water Act. Because the information requested has not been publicly disclosed, its disclosure would significantly enhance public understanding concerning state and federal compliance with the Clean Water Act, in particular EPA’s obligation to ensure that water quality standards for toxic pollutants are up-to-date and adequate to protect threatened or endangered species such as salmonids and orca whales, both of which are suffering the ill effects of toxic pollution in Washington waters.

9. The above-described interests of NWEA and its members have been, are being, and, unless the relief requested herein is granted, will continue to be adversely affected by EPA’s disregard of its statutory duties under the FOIA and by the unlawful harm that results. EPA’s failure to fully implement the FOIA injures the interests of NWEA and its members and the relief requested in this lawsuit can redress these injuries.

10. Defendant U.S. Environmental Protection Agency is an agency of the executive branch of the United States government. EPA is in possession, custody, or control of records sought by NWEA and it is subject to the FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

11. The purpose of the FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S. Rep.

No. 813, 89th Cong., 1st Sess., 3 (1965). “[D]isclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The FOIA therefore requires federal agencies to disclose records to any person upon request unless the information falls within one of nine narrow disclosure exemptions listed in the Act. *See* 5 U.S.C. §§ 552(a)(3)(A), (b); *see also Rose*, 425 U.S. at 361 (“These exemptions are explicitly made exclusive ... and must be narrowly construed.”) (internal citation and quotation marks excluded).

12. The FOIA imposes strict and rigorous deadlines on federal agencies. The Act requires a federal agency that receives a FOIA request to determine whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination to the requester within twenty business days. 5 U.S.C. § 552(a)(6)(A)(i). If the agency determines the records are not exempt from public disclosure, the agency is required to make the requested records “promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A). The FOIA requires each agency to make “reasonable efforts” to search for records. 5 U.S.C. § 552(a)(3)(C).

13. The FOIA requires agencies to notify requesters of their right to appeal adverse FOIA determinations. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). Requesters must submit such appeals within ninety days of receiving the adverse determination. *Id.* If the requester appeals an agency’s determination, the agency must make a determination with respect to that appeal within twenty business days of receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

14. U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

STATEMENT OF FACTS

The Petition for Rulemaking

15. On October 28, 2013, NWEA petitioned EPA seeking rulemaking to update Washington State’s water quality criteria for toxic pollutants to protect human health and aquatic

1 life in Washington.

2 16. On May 31, 2017, EPA denied NWEA's petition. EPA explained in a letter that it
3 was denying the petition in large part because the Washington Department of Ecology
4 ("Ecology") was planning on doing the work NWEA requested of EPA and because EPA wanted
5 to defer to Ecology. EPA's letter denying NWEA's petition for rulemaking refers to EPA's work
6 with Ecology over the past several years on matters related to the Petition, as well as
7 conversations and workshops with Ecology.

8 **NWEA's FOIA Request No. EPA-HQ-2017-011463, and EPA's Response**

9 17. On September 13, 2017, NWEA submitted a FOIA request to EPA that requested
10 "all documents prepared or utilized by, in the possession of, or routed through the EPA related to
11 [t]he October 28, 2013 petition by NWEA to EPA seeking rulemaking to update Washington
12 State's criteria for toxics." The request specified that NWEA sought only those records dated
13 from October 28, 2013 to the date upon which EPA began its search for records responsive to the
14 request. EPA assigned NWEA's September 13, 2017 FOIA request reference number EPA-HQ-
15 2017-011463 (hereinafter "NWEA's FOIA Request").

16 18. On September 21, 2017, EPA notified NWEA that it planned to respond to
17 NWEA's FOIA Request by December 13, 2017.

18 19. On October 13, 2017, EPA notified NWEA that it had posted an interim response
19 to NWEA's FOIA Request on FOIA Online, an internet-based portal that some agencies
20 including EPA use to communicate with FOIA requesters about the status of their requests.
21 When NWEA checked FOIA Online, however, NWEA could not find or download an interim
22 response to its FOIA request. On October 27, 2017, after NWEA notified EPA of the absence of
23 records responsive to NWEA's FOIA Request on FOIA Online, EPA sent NWEA two
24 responsive records by email.

25 20. On December 12, 2017, EPA notified NWEA that EPA needed to extend the
26 December 13, 2017 response deadline due to the large number of responsive records.

21. Between January 3, 2018 and July 26, 2018, EPA released four sets of records to NWEA. In a letter dated July 26, 2018 that accompanied EPA's last release of responsive records, EPA stated it had concluded its search for records responsive to NWEA's FOIA Request. EPA's July 26, 2018 release letter notified NWEA of its right to file an administrative appeal if NWEA believed EPA's disclosures did not fully comply with the FOIA.

22. EPA released 1,041 pages of records to NWEA in response to NWEA's FOIA Request. However, despite the fact that EPA denied NWEA's October 2013 petition—the subject of NWEA's FOIA Request—largely on the basis of past or expected future actions and/or efforts by the Washington Department of Ecology, EPA did not produce any records regarding such Ecology actions and/or efforts, or any communications between EPA and Ecology discussing such actions and/or efforts.

23. EPA did not state in its July 26, 2018 letter to NWEA that EPA had withheld any responsive records in full; however, many of the pages produced by EPA in response to NWEA's FOIA Request were withheld in part. In EPA's July 26, 2018 final response letter, EPA stated that it was withholding portions of responsive records pursuant to FOIA exemption (b)(5), 5 U.S.C. § 552(b)(5) based on the deliberative process, attorney-client, and attorney work-product privileges, and pursuant to FOIA exemption (b)(6), 5 U.S.C. § 552(b)(6), the personal privacy exemption. EPA further stated that "[t]he records are exempt from disclosure because they are pre-decisional and deliberative and would harm agency decision making if released, are confidential communications between an agency attorney and client concerning legal advice or are documents prepared by, or at the direction of, an attorney in contemplation of litigation, or contain personal information which would be an unwarranted invasion of personal privacy if released." EPA did not provide document-specific information to support its determinations that the withheld portions of the responsive records qualify for the claimed exemptions.

FOIA Appeal No. EPA-HQ-2019-000838

24. By email dated October 24, 2018, NWEA submitted an administrative appeal to

1 EPA, asserting that EPA failed to conduct an adequate search reasonably calculated to locate
 2 information responsive to NWEA's FOIA Request and that EPA unjustifiably redacted portions
 3 of the released records. EPA assigned NWEA's administrative FOIA appeal number EPA-HQ-
 4 2019-000838 (hereinafter "NWEA's FOIA Appeal").

5 25. NWEA's FOIA Appeal was timely because EPA received the Appeal no later
 6 than ninety calendar days after July 26, 2018, the date that EPA concluded its response to
 7 NWEA's FOIA Request.

8 26. As indicated on FOIA Online, EPA estimated that it would complete review of
 9 NWEA's FOIA Appeal by November 26, 2018.

10 27. EPA did not issue a determination on NWEA's FOIA Appeal by November 26,
 11 2018, nor did EPA update NWEA on the status of its determination.

12 28. On December 6, 2018, NWEA notified EPA of its failure to meet the FOIA
 13 deadline for responding to NWEA's FOIA Appeal and inquired into the status of EPA's
 14 response to NWEA's FOIA Appeal.

15 29. On February 7, 2019, NWEA again reminded EPA of its FOIA obligations and
 16 inquired into the status of EPA's response to NWEA's FOIA Appeal.

17 30. As of the date this action was filed, EPA has not responded to NWEA's FOIA
 18 Appeal, nor has EPA responded to NWEA's December 6, 2018 and February 7, 2019 requests
 19 for information about the status of NWEA's FOIA Appeal.

20 31. As of the date this action was filed, EPA has not requested additional information
 21 from NWEA regarding NWEA's FOIA Appeal.

22 32. NWEA is directly and adversely affected and aggrieved by EPA's failure to
 23 respond to NWEA's FOIA Appeal by the statutory deadline; by EPA's failure to conduct an
 24 adequate search for all records responsive to NWEA's FOIA Request; and by EPA's unlawful
 25 and improper withholding of and redaction of responsive records.

26 33. Based on the nature of NWEA's organizational activities, it will undoubtedly
 27 continue to employ the FOIA's provisions in record requests to EPA in the foreseeable future.
 28

34. Unless enjoined and made subject to a declaration of NWEA's legal rights by this Court, EPA will continue to violate the FOIA and NWEA's rights to receive public records under the FOIA.

35. NWEA has been required to expend costs and to obtain the services of a law firm to prosecute this action.

36. Because EPA has failed to respond to NWEA's FOIA Appeal within the period required by the FOIA, NWEA has constructively exhausted all administrative remedies required by the FOIA and may seek immediate judicial review. 5 U.S.C. §§ 552(a)(6)(A)(ii), (a)(6)(C)(i).

CAUSES OF ACTION

CLAIM I

VIOLATION OF THE FREEDOM OF INFORMATION ACT: VIOLATION OF FOIA DEADLINE

37. NWEA hereby incorporates by reference the allegations in the preceding paragraphs.

38. NWEA has a statutory right to have the EPA process NWEA's FOIA Appeal in a manner that complies with the FOIA. EPA violated NWEA's rights in this regard when EPA unlawfully delayed its response to NWEA's FOIA Appeal beyond the deadline imposed by the FOIA.

39. NWEA is directly and adversely aggrieved by EPA's failure to respond to NWEA's FOIA Appeal by the deadline set forth in 5 U.S.C. § 552(a)(6)(A)(ii).

40. NWEA is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

CLAIM II

VIOLATION OF THE FREEDOM OF INFORMATION ACT: UNLAWFUL WITHHOLDING OF RESPONSIVE RECORDS AND REASONABLY SEGREGABLE PORTIONS OF RESPONSIVE RECORDS

41. NWEA hereby incorporates by reference the allegations in the preceding paragraphs.

42. NWEA has a statutory right to the records it seeks, which are "agency records"

1 within the meaning of the FOIA.

2 43. NWEA has a statutory right to all the records it seeks, including to any reasonably
3 segregable portions of responsive records that contain information lawfully exempted pursuant to
4 5 U.S.C. § 552(b).

5 44. On information and belief, and in light of the absence of certain records in EPA's
6 FOIA Response, EPA has violated NWEA's rights by withholding from public disclosure
7 records, or portions of records, to which NWEA is entitled and to which the FOIA exemptions at
8 5 U.S.C. § 552(b) do not apply. This includes EPA's unlawful withholding of records in their
9 entirety; EPA's unlawful withholding of reasonably segregable portions of responsive records
10 that were withheld in their entirety; and EPA's unlawful withholding of portions of responsive
11 records that were produced in redacted form pursuant to the FOIA exemptions.

12 45. NWEA is entitled to reasonable costs of litigation, including attorneys' fees
13 and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

14 CLAIM III

15 VIOLATION OF THE FREEDOM OF INFORMATION ACT: 16 FAILURE TO CONDUCT AN ADEQUATE SEARCH

17 46. NWEA hereby incorporates by reference the allegations in the preceding
18 paragraphs.

19 47. The FOIA requires federal agencies to respond to FOIA requests by conducting a
20 search reasonably calculated to discover all responsive documents. An agency must take into
21 account leads and other positive indications that suggest other records might be located outside
22 the scope of its original search.

23 48. On information and belief, EPA violated the FOIA and NWEA's right to an
24 adequate FOIA search by failing to conduct a search reasonably calculated to uncover all
25 documents responsive to NWEA's FOIA Request and by failing to take into account leads and
26 positive indications of responsive documents represented in the exhibits provided to Defendant
27 by NWEA as part of NWEA's FOIA Appeal.

49. NWEA is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

REQUESTS FOR RELIEF

WHEREFORE, NWEA requests that this Court:

A. Adjudge and declare that EPA has violated the FOIA for the reasons set forth above;

B. Order EPA to comply immediately with the FOIA by conducting an adequate search for records responsive to NWEA's FOIA Request, with the cut-off date for such searches being the date the new searches are conducted;

C. Order EPA to produce to NWEA by a date certain all responsive records and reasonably segregable portions of exempt records sought in this action;

D. Order EPA to respond to NWEA's Administrative Appeal No. EPA-HQ-2019-000838;

E. Award NWEA its reasonable attorneys' fees and litigation expenses and costs pursuant to 5 U.S.C. §552(a)(4)(E), or any other applicable law;

F. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

G. Grant such further and additional relief as this Court may deem just and proper.

Respectfully submitted this 6th day of June 2019.

s/ Paul Kampmeier
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